

# **Exhibit 9**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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BMG RIGHTS MANAGEMENT (US) LLC, :  
et al., :  
 :  
Plaintiffs, :  
 :  
vs. : Case No. 1:14-cv-1611  
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 :  
COX ENTERPRISES, INC., et al., :  
Defendants. :  
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HEARING ON MOTIONS

June 26, 2015

Before: John F. Anderson, Mag. Judge

APPEARANCES:

John M. Caracappa, Paul Gennari, and Walter D. Kelley, Jr.,  
Counsel for the Plaintiffs

Brian D. Buckley and Craig C. Reilly,  
Counsel for the Defendants

1           NOTE: The case is called to be heard at 10:52 a.m.  
2 as follows:

3           THE CLERK: BMG Rights Management (US) LLC, et al.  
4 versus Cox Enterprises, Inc., et al., civil action number  
5 14-cv-1611.

6           MR. KELLEY: Good morning, Your Honor. Walter Kelley  
7 on behalf of plaintiffs. With me are John Caracappa and Paul  
8 Gennari. Mr. Caracappa is going to argue.

9           THE COURT: Okay.

10          MR. REILLY: Good morning, Your Honor. Craig Reilly  
11 for the Cox defendants, together with my co-counsel Brian  
12 Buckley. And then from Cox itself, Stephanie Allen-Wang.

13          THE COURT: Okay. And who is going to argue, Mr.  
14 Reilly?

15          MR. REILLY: Mr. Buckley will, Your Honor.

16          THE COURT: Okay. Well, Mr. Buckley, let me first,  
17 before we get into the argument phase, I hope you brought to  
18 Ms. Frazier's attention my order that she not be telling people  
19 to send me letters.

20          MR. BUCKLEY: Absolutely, Your Honor. As soon as we  
21 got your order, it was communicated to Cox. Is that what you  
22 mean, to the client?

23          THE COURT: Yes.

24          MR. BUCKLEY: Yes, absolutely.

25          THE COURT: I mean, you know, you say you're not

1 providing people with legal advice, and then you provide them  
2 with bad legal advice. That is, you say: We can't provide you  
3 with any legal advice, but you should send letters to the  
4 magistrate judge involved in the case. That's bad legal  
5 advice.

6 And, you know, you need to make sure that I don't  
7 start getting any more letters from any of your customers  
8 having been referred to send me letters from someone in the  
9 legal department at Cox. Is that clear?

10 MR. BUCKLEY: It's very clear, Your Honor. I  
11 apologize for that. It was part of what I had hoped at the  
12 last hearing to clarify what the process was going to be, and  
13 we made a mistake. And I apologize.

14 THE COURT: Well, you know, the Clerk of the Court,  
15 file it with the court, something like that. But the idea that  
16 you're suggesting to someone that they mail letters to a  
17 judicial officer, isn't the way things are done in the Eastern  
18 District of Virginia.

19 MR. BUCKLEY: And we apologize, Your Honor.

20 THE COURT: It may be done differently in Atlanta or  
21 something like, but, you know, you've got to know the ball  
22 field you're playing in, and -- okay.

23 Well, we've got a number of different motions. I  
24 think the -- I will take them up in a little bit different  
25 order than they were filed in because I think it may be easier

1 to just get through a couple of them, and then deal with the  
2 others.

3 The motion to compel Rightscorp. My understanding is  
4 that with a representation that all of the Steele documents  
5 have been produced, the only issue there has to do with the  
6 source code, is that -- am I correct on that?

7 MR. BUCKLEY: With the caveat, Your Honor, that we  
8 just want to understand that we've received all of the  
9 responsive Steele documents. And with that understanding, or  
10 at least with that certification from plaintiffs, that should  
11 be a nonissue.

12 THE COURT: All right. Well, on the source code  
13 issue -- and you saw in their opposition they're talking  
14 about -- well, you know, talking about all code that relates to  
15 particular functions that are done, is not really realistic.

16 I mean, there are certain areas in which you've  
17 outlined where, you know, certain components can be identified.  
18 And I think you pointed out one that they may have  
19 misidentified. And they said, here it is, and you looked and  
20 found out that it was there.

21 But my concern has to do with the way that you've --  
22 you know, all code that connects to, reads, or so-and-so that  
23 does such and such, all code that does so and so, as opposed  
24 to, you know, what is the source code for a particular routine  
25 or something like that.

1           And I think you understand the position they're in.  
2       And that if I order them to produce all the code and there is  
3       an extraneous piece of code that goes from, you know, one  
4       routine to another that then goes to another routine, that that  
5       code is related to an execution.

6           So, I mean, I understand your need to want to make  
7       sure that you've got all the source code, but I'm also  
8       concerned about the way that you have this worded as to all  
9       code relating to certain things.

10           So help me figure out a way to get you what you want  
11       but not put them in a jam by doing that.

12           MR. BUCKLEY: Your Honor, and that's fair. And this  
13       is not intended to be a gotcha exercise so we can say later,  
14       oh, you were told to give us every line of code and you failed  
15       to do that.

16           It really is an attempt to understand what we've  
17       already received and to get an unequivocal statement that the  
18       specific things we've asked for have been produced, which we  
19       have not been able to get. So that's really the bigger issue.

20           If we could get a statement based on somebody with  
21       knowledge, like if it's Mr. Boswell, fine. What we need is a  
22       statement that the things that we've identified have been  
23       produced. And if they have, then there's nothing more to argue  
24       about.

25           The issue we've had is that we've had -- we've been

1 given that representation before and it's turned out not to be  
2 true. So some of the things we've identified are specific  
3 files. They were able to respond on a couple of them and say,  
4 oh, it's named something else. So on those, that should be  
5 easy.

6 On the other, and particularly the categories that  
7 you're focussed on, Your Honor, where it says all the code that  
8 relates to a particular function, obviously our experts are  
9 going to look at that code, they are looking at that code. If  
10 we get a representation from the plaintiffs based on somebody  
11 who knows that the code related to those functions has been  
12 produced, then I don't think there is anything left to argue  
13 about.

14 THE COURT: Okay. All right. Let me hear from the  
15 plaintiffs on this. First as to the Steele documents.

16 MR. CARACAPPA: Yes, Your Honor. I can represent  
17 that after a reasonable search, to the best of my knowledge,  
18 all of those Steele documents have been produced.

19 THE COURT: Well, I want to understand what  
20 reasonable is and based on your knowledge. Is this somebody  
21 saying, I think I've done it all? Or is this somebody -- I  
22 mean, I want a representation, not a somebody told me  
23 something.

24 And, you know, we're not going to be playing games in  
25 this case. And, you know, either you're going to represent

1 that they've been all produced or you're going to represent --  
2 or you're not going to represent it.

3 So you're the person who's here to respond to this  
4 motion. You're the one who's charged with doing what you need  
5 to do on behalf of your clients.

6 So the question is, have all of the nonprivileged  
7 documents that were discussed in the Steele deposition, have  
8 they been produced?

9 MR. CARACAPPA: All the documents that were discussed  
10 in the Steele deposition that Cox asked for that are the  
11 subject of this motion have been produced, yes.

12 THE COURT: Okay. Okay. What about the source code?

13 MR. CARACAPPA: With respect to the source code, I  
14 think it's an unfair representation that we have not been  
15 producing the code or we have produced it piecemeal.

16 We made it available for inspection months ago. And  
17 there have been times where Cox has said to us, we can't find  
18 File X or File Y or File Z. In some of those instances we  
19 said, it's named something else, here it is.

20 In others of those -- in other instances we've said,  
21 okay, we'll produce that module because we have not yet  
22 produced it.

23 So when Cox came to us with this list, we need  
24 confirmation that all these things have been produced, we said,  
25 our client is on vacation, they get back on Friday, we will



1 confirm with them on Friday that all of this has been produced.  
2 If it hasn't, we will produce it.

3 It has been our procedure that as soon as we find out  
4 something is not produced, we produce it within two days, three  
5 at the most. And that's exactly what we plan to do here. We  
6 have a call scheduled with the client today to either confirm  
7 to Cox that all this code has been produced. Or if it hasn't,  
8 to produce the module.

9 Cox wanted the representation last week. Our client  
10 was on vacation, so we spoke to our expert. And our expert  
11 said, it seems to all be here. So that's the representation we  
12 gave him, with the caveat that we have to speak to the client  
13 on Friday to confirm.

14 THE COURT: All right. Well, I want you to speak to  
15 the client today. Make a representation. And if the  
16 representation is, we have to produce additional material, I  
17 want it done by 5 o'clock on Tuesday.

18 MR. CARACAPPA: Yes, Your Honor.

19 THE COURT: Okay. So, you know, talk to the client.  
20 Get back to them. If there is anything else that needs to be  
21 produced, it needs to be produced by 5 o'clock on Tuesday.

22 MR. CARACAPPA: Okay, Your Honor. Thank you.

23 THE COURT: Okay.

24 MR. CARACAPPA: Yes.

25 THE COURT: All right. So that should take care of

1 that one.

2 Now, the motion to compel as to the plaintiffs.  
3 Let's take it up with the documents relating to communications  
4 and the relationships with Rightscorp.

5 What remains at issue in that part of this motion?

6 MR. BUCKLEY: So to be clear, we're not asking them  
7 to scorch the earth. What we were told on the 18th when we  
8 conferred was that there are documents in plaintiffs'  
9 possession that relate in some way to Rightscorp. They were  
10 collected, they were reviewed, and then the plaintiffs went  
11 through and cherry-picked what they were going to provide to  
12 us. And as we understand it, that cherry-picking was documents  
13 that relate to Rightscorp generally, and I don't know what  
14 means exactly, and documents that relate to Rightscorp with  
15 respect to Cox.

16 What we said was, we're entitled to see what you have  
17 that relates to Rightscorp. And if that's documents, for  
18 example, that relate to Rightscorp vis-à-vis some other ISP,  
19 not Cox, that is certainly discoverable and I think potentially  
20 highly relevant, the relationships between plaintiffs and  
21 Rightscorp, and not just Cox, but other ISPs.

22 And so, all we've asked for is whatever is not  
23 privileged, give us the Rightscorp information that you already  
24 collected. And so far they have declined to do that.

25 THE COURT: Let's deal with that issue, and then I'll

1 deal with the financial information.

2 MR. CARACAPPA: Thank you, Your Honor.

3 So Rightscorp has produced all -- sorry. Copyright  
4 holders have produced all documents generally related to  
5 Rightscorp. And what that means is, if copyright holders had a  
6 correspondence or a conversation with Rightscorp about, for  
7 example, how does your software work, how do you figure out how  
8 people infringe on the network, all of that stuff has been  
9 produced.

10 If copyright holders have corresponded with  
11 Rightscorp regarding Cox, all of that has been produced.

12 Documents that have been withheld are documents --

13 THE COURT: Why would you -- well, why would you  
14 necessarily have documents relating to correspondence between  
15 copyright holders and Rightscorp? That's what you just said  
16 you produced, right?

17 MR. CARACAPPA: Yes. Well, Rightscorp has  
18 correspondence related to the copyright holders. Right?

19 THE COURT: Right, right.

20 MR. CARACAPPA: So the copyright holders may ask  
21 Rightscorp, what do you do, how do these -- how did these  
22 things work? All of that has been produced.

23 THE COURT: And all of that is in the possession of  
24 the plaintiffs?

25 MR. CARACAPPA: It's either been produced as it

1 exists in the possession of the plaintiffs, or as it existed in  
2 the possession of Rightscorp. So it has been produced by one  
3 of those entities.

4 THE COURT: All right. Well, I mean, the motion to  
5 compel that I'm dealing with right now is a motion to compel  
6 against the plaintiffs.

7 MR. CARACAPPA: Yes.

8 THE COURT: So I need to understand what the issue is  
9 far as the documents that are in the possession, custody, or  
10 control of the plaintiffs that would be responsive to the  
11 document requests that have been served.

12 And, you know, honestly, the responses, the written  
13 responses that you provide don't really give the impression  
14 that you're withholding anything other than privileged  
15 information. And it sounds like you're parsing out more than  
16 just privileged information in your responses to the documents  
17 that you've provided, is that right?

18 MR. CARACAPPA: Yes, Your Honor. The documents that  
19 we have related to non-Cox ISPs -- or non-Cox Internet service  
20 providers, Verizon, for example, that stuff is not relevant.  
21 And we objected on the grounds of relevance.

22 And during the meet and confer process it came out  
23 that we were withholding it, and we weren't hiding it, but they  
24 asked us, what are you withholding? We said, these are the  
25 things we're withholding as not being relevant. Cox seems to

1 disagree.

2 We don't understand the relevance of that  
3 information. If they're asking us to produce the notice  
4 letters, for example --

5 THE COURT: Well, why would Cox have -- and this is  
6 where I got confused. Okay. And talking about your clients,  
7 and I guess -- I'm talking about the plaintiffs, not just your  
8 clients, because I guess you're also representing Rightscorp.  
9 But this document request goes to the plaintiffs.

10 MR. CARACAPPA: Yes.

11 THE COURT: Why would your plaintiffs necessarily  
12 have information that is between Rightscorp and other entities  
13 other than you?

14 MR. CARACAPPA: They would -- they would have  
15 information as between Rightscorp and other ISPs. So my client  
16 works with Rightscorp to address infringers not just on the Cox  
17 network, but on other networks.

18 THE COURT: Right. But the infringers -- so anything  
19 that Rightscorp gets, they send to you, typically?

20 MR. CARACAPPA: Not -- I don't know the answer to  
21 that question. I don't think that's necessarily true, not  
22 everything, no.

23 THE COURT: Why isn't your clients' relationship with  
24 other Internet service providers at least relevant to the  
25 issues involved in this case?

1 MR. CARACAPPA: We don't feel that Cox has been able  
2 to explain how. What's relevant to the issue in this case is  
3 Cox and the infringement on its network. We don't understand  
4 how the infringement on other networks is relevant.

5 In addition, we're not quite sure exactly what Cox  
6 wants us to produce. They want us to produce the notice  
7 letters we've sent to other people on non-Cox networks? We're  
8 not quite sure how that's relevant, and it would involve  
9 producing millions of other notice letters.

10 So we're trying to understand how the additional  
11 information they need they think is relevant. And the only  
12 thing they can say is, well, it's relevant to the agency  
13 relationship.

14 And, one, we don't necessarily think it is relevant  
15 to the agency relationship. But even if it is, we're not sure  
16 how the agency relationship is relevant to any of the issues in  
17 the case.

18 THE COURT: Well, certainly the agency relationship  
19 -- your having them act on your behalf by sending these  
20 notices, right? I mean, so the agency relationship has to be  
21 at least relevant or a part of this case.

22 MR. CARACAPPA: And let me rephrase. We think the  
23 documents we've produced already establish that.

24 THE COURT: Establish it, right. I understand that  
25 part.

1 MR. CARACAPPA: Okay.

2 THE COURT: All right. All right, well, let me go  
3 back and hear from the defendant as to the relevancy other -- I  
4 mean, other than relationships with other ISPs --

5 MR. BUCKLEY: Right, Your Honor. So there -- I'm  
6 sorry.

7 THE COURT: And I'm, you know -- I think some broad  
8 information as to maybe relevancy, or who they deal with other  
9 ISPs, but every single notice letter that was sent to Verizon,  
10 I mean --

11 MR. BUCKLEY: We do not want that information, Your  
12 Honor. This is not relationships with other ISPs. The issue  
13 is relationships between plaintiffs, which Mr. Caracappa refers  
14 to as copyright holders, which sometimes muddies things,  
15 plaintiffs, and Rightscorp.

16 So we have gotten part of that universe of documents,  
17 but there is another part of that universe, which is  
18 relationships between plaintiffs and Rightscorp that are not  
19 specific to Cox. And the question is how could that  
20 potentially be relevant. Let me give you one example.

21 So we believe -- and this is me talking and this is  
22 the way that we view the case, but we believe and the evidence  
23 I think is going to show that plaintiffs and Rightscorp picked  
24 Cox as their target for this lawsuit. And it's possible that  
25 they were careful about their communications, plaintiffs and

1 Rightscorp, so that they didn't prejudice their claims in this  
2 lawsuit or there wasn't something discoverable in this lawsuit  
3 that they didn't want out there. They may not have been as  
4 careful with respect to say Verizon.

5 So maybe there is an agreement between plaintiffs and  
6 Rightscorp that relates to Verizon that says something very  
7 different than what they're saying in this suit. Maybe there  
8 are communications between plaintiffs and Rightscorp about  
9 Verizon that undermine what they're saying in this lawsuit. We  
10 don't know.

11 What we do know is there is a universe of a documents  
12 that are not privileged that relate directly to the  
13 relationship between plaintiffs and Rightscorp, which is at the  
14 heart of this lawsuit as Your Honor just observed, and that we  
15 have not been provided.

16 I think what -- and relevance isn't the standard.  
17 Discoverability is the standard. And I think absolutely that  
18 information is discoverable. Whether it ultimately ends up  
19 being relevant or part of the case is not the issue.

20 THE COURT: So -- all right. Go back and help me  
21 understand, whatever the relationship that the plaintiffs may  
22 have with Rightscorp as to Verizon --

23 MR. BUCKLEY: Right.

24 THE COURT: How does that bear on the claims that the  
25 plaintiffs are bringing against Cox in this case?



1 MR. BUCKLEY: So plaintiffs' theory is that when they  
2 send notices to Cox -- when Rightscorp sends notice to Cox that  
3 include settlement language, we have an obligation to forward  
4 those notices to our subscribers. And if we don't do that,  
5 we're guilty of contributory infringement.

6 And when we went back to Rightscorp and said, we're  
7 happy to forward proper notices, just remove the settlement  
8 language, they refused.

9 What if, for example, their relation -- Rightscorp  
10 and plaintiffs' relationship with Verizon is very different?  
11 What if they send a different kind of notice to Verizon? Or  
12 what if they sent settlement notices to Verizon and when  
13 Verizon pushed back, Rightscorp said, okay, we'll change the  
14 notice, we'll fix the language?

15 I think that would be probative. I think Your Honor  
16 might be interested in knowing that, so might the jury be  
17 interested in knowing that.

18 THE COURT: It's still what your obligations are,  
19 right? I mean, are you required to do it or aren't you  
20 required to do it under the law? And they don't have to treat  
21 every single customer the exact -- or every single entity the  
22 exact same way.

23 MR. BUCKLEY: And that may be true as a legal matter,  
24 Your Honor, but that doesn't mean that this information isn't  
25 potentially probative and isn't discoverable.

1           And it may also be that the agency relationship  
2 between plaintiffs and Rightscorp as it relates to Cox is  
3 unique in some way. And I think we're entitled --

4           THE COURT: And so --

5           MR. BUCKLEY: -- to explore that.

6           THE COURT: But again, so what if it is unique? I  
7 mean, how does that, when push comes to shove, how does that  
8 bear on anything that has to do with a claim or defense in this  
9 case?

10          MR. BUCKLEY: So if --

11          THE COURT: As long as there is a relationship, and  
12 it's a valid relationship, and they have agency, and they are  
13 doing things that are within the realm of the law, if they do  
14 something differently against another entity, I'm not sure how  
15 that has any bearing on a claim or defense in this case.

16          MR. BUCKLEY: Your Honor, respectfully, if the  
17 plaintiffs and Rightscorp picked Cox out as a target and their  
18 -- and essentially set Cox up for this lawsuit. Right?  
19 They've been sending notices into a black box for three years  
20 and waiting to suit. If they are treating other ISPs  
21 differently, if they are telling other ISPs you actually don't  
22 have an obligation to forward a notice that looks like this, or  
23 you're not liable for contributory infringement just because  
24 somebody on your network might be infringing -- whether that is  
25 ultimately determinative on the legal issue is not, in my view

1 -- that is not the issue here. And it certainly, I believe,  
2 certainly would be probative and certainly be interesting to a  
3 jury if Cox was set up, essentially, for this lawsuit in a way  
4 that other ISPs have not.

5 And plaintiffs are large organizations, lots of  
6 copyrights, and for some reason they chose Cox and they handled  
7 Cox in a particular way and the notices to Cox in a particular  
8 way. We're entitled to explore that.

9 And it may be ultimately that the relationship with  
10 Verizon isn't relevant, and maybe none of that comes in at  
11 trial, but we don't know. Until we see what those documents  
12 are, and they have been collected, they are sitting there, easy  
13 to produce, until we see them, we won't know whether they are  
14 relevant or not.

15 THE COURT: Well, sitting there and easy to produce  
16 are two different things.

17 MR. BUCKLEY: Fair enough. I don't mean to be glib  
18 about that. Production takes time. But the point is, they've  
19 been collected and then were cherry-picked. Plaintiffs decided  
20 unilaterally what was interesting to us, what was relevant to  
21 us, what we were entitled to see. And there is a set of  
22 documents sitting there that they collected and decided weren't  
23 relevant. And I think that's a determination for Cox to make  
24 or for Your Honor to make, but we haven't seen the documents.

25 THE COURT: Okay. What -- all right, let me go back

1 and hear from the plaintiff.

2 What documents haven't you produced that relate to  
3 your relationship with Rightscorp?

4 MR. CARACAPPA: Sure, Your Honor. Let me just make  
5 one point before I answer that question.

6 I think they don't have the standard quite correct.  
7 They still have to prove relevance. They can't just ask for  
8 documents and look at them and say, well, I'll look at them and  
9 then argue relevance later.

10 They don't have to necessarily prove admissibility,  
11 but they certainly have to prove to the Court that the  
12 information --

13 THE COURT: Well, if you wrote Verizon and told  
14 Verizon, this is not contributory copyright infringement,  
15 that's an admission, right? You don't need to send these  
16 notices, we don't believe it's contributory copyright  
17 infringement, but we really wish you would.

18 MR. CARACAPPA: Well, to be clear, we told Cox in the  
19 notice letters that they don't have an obligation to forward  
20 these settlement offers on to their customers.

21 So, again, as Your Honor pointed out, we don't think  
22 any correspondence with Verizon or Comcast relate to Cox's  
23 liability for what Cox is doing in this case and pursuant to  
24 the law. What other people do or what we do with other people  
25 is entirely irrelevant.

1           Now, to your --

2           THE COURT: Not if you've made admissions to them  
3 that are different than the claims you're making here. I mean,  
4 if you have indicated to them, we do not believe X and we will  
5 not pursue a claim for X, and then you turn around and you do  
6 that here, that would be relevant, wouldn't it?

7           MR. CARACAPPA: Arguably, yes, that would be  
8 relevant. I am not aware of any documents like that in this  
9 case.

10          THE COURT: Well, no, I'm sure you're not, but --  
11 well, tell me, tell me what we're talking about as far as --  
12 and we're not talking about the notices that were sent or  
13 things like that.

14          What do we have -- what do you have that relates to  
15 the relationship between the plaintiff here and Rightscorp that  
16 you've withheld -- I guess it has to do with Verizon and  
17 Comcast?

18          MR. CARACAPPA: Discussions about Verizon and  
19 Comcast, for example, yes. And the notice letters --

20          THE COURT: Well, the notice --

21          MR. CARACAPPA: -- that relate to other people.

22          THE COURT: Right.

23          MR. CARACAPPA: So outside that, discussions as they  
24 relate to Verizon and Comcast, for example. So non-Cox ISPs.  
25 I don't know standing here today the universe of those

1 documents.

2 THE COURT: Well, you know, I'm persuaded now I think  
3 by the defendants' argument that they do have -- certainly not  
4 the notice letters, and I don't think you want to produce them  
5 or they want to get them. But I do think, given the nature of  
6 the case at this stage in the discovery, I can't say that it  
7 wouldn't be discoverable information.

8 So I am going to require you provide the other  
9 documents relating to the relationship between Rightscorp and  
10 the plaintiffs that are not solely related to Cox to be  
11 produced.

12 The other -- I guess so now let's get to the other  
13 one that I thought was going to be the more difficult one. I  
14 thought that one was going to be fairly easy.

15 But this one, the financial information, I take it  
16 that the defendants' argument there is that actual damages are  
17 a factor that come into play in making a determination as to  
18 where in the range of statutory damages the amount should be  
19 set, is that basically it?

20 MR. BUCKLEY: Yeah, that's exactly right, Your Honor.  
21 That's exact right.

22 THE COURT: And what is it that you have now and what  
23 is it that you think that you would need in order to get --  
24 and, you know, we're not talking about down to the last penny  
25 kind of thing.

1 MR. BUCKLEY: Right.

2 THE COURT: We have to talk about the practical  
3 aspects of, you know, what really -- what would your expert  
4 need in order to come up with some information as opposed to  
5 each and every invoice as to profit, loss, overheard, those  
6 kinds of things.

7 MR. BUCKLEY: No, we don't. You're right, Your  
8 Honor, we don't want or need that sort -- that granular level  
9 of detail.

10 What we've been provided so far, however, is for BMG  
11 top level revenue associated with particular copyrighted works  
12 and not even the entire universe of works that are being  
13 asserted in the case.

14 And for Round Hill, similarly a top line revenue  
15 number for each work, not all the works, and for Round Hill not  
16 even broken down by year. So just work and dollar amount.

17 It was -- they are not business records. They were  
18 prepared for the purposes of this litigation. It's not  
19 information that is kept in the ordinary course. So we  
20 actually have no, no business record financial information at  
21 all.

22 And I think it's probably obvious that a top line  
23 revenue number tells you nothing about profit. It doesn't --  
24 and you can't break it down. There are different ways they  
25 earn income from each of these works.

1           So we've actually said specifically, and we've told  
2           them in correspondence, and it's also in our motion, what our  
3           experts need. And it's at page 4 of our motion, Your Honor.  
4           But we need information by distribution channel.

5           So income derived from, for example, income derived  
6           from physical album sales, digital downloads, streaming  
7           royalties, licensing royalties. So we can break out how the  
8           revenue for each work. You know, what comprises revenue for  
9           each work. Revenues per channel --

10          THE COURT: Why is that necessarily needed? I mean,  
11          I take it because you're going to try and focus on the  
12          downloading revenue and see how that was impacted, or what?

13          MR. BUCKLEY: Right. And I am certainly not a  
14          financial expert, Your Honor, and some of this is, obviously,  
15          information that I'm passing on that our expert is saying he  
16          needs to do an actual damages analysis. So I want to make  
17          clear that on some of these I'm not the person to answer the  
18          specifics.

19          But in general our -- we should be able to do our own  
20          analysis of had plaintiffs chosen to pursue an actual damages  
21          theory, what would it have shown. Because the actual damages  
22          inform the statutory damages issue. It's not the only issue  
23          and it doesn't have to be a one-to-one ratio, but it's one of  
24          the elements.

25          So to get to actual damages, you're talking about



1 lost profits potentially. So what is the profit that is lost  
2 for a copyrighted work when a subscriber out in the universe  
3 downloads it as opposed to buying it in the store. And this is  
4 just one example.

5 But to get to that, you've got to understand how is  
6 the revenue that is associated with that work, how does it  
7 break down? If part of it is physical album sales, that might  
8 be relevant. But if part of it is -- and part of it is  
9 streaming, that might be relevant.

10 But if part of it is licensing royalties, for  
11 example, that might be totally irrelevant to determining  
12 whether there was profit lost.

13 Until you have that breakdown, there is no way to  
14 tell. All we've got right now is a dollar figure per work.

15 THE COURT: But if you get that information --

16 MR. BUCKLEY: Yes.

17 THE COURT: How do you -- how does that translate  
18 to -- somebody downloaded some material inappropriately. How  
19 is anybody then going to know whether if that hadn't been done,  
20 would that person have downloaded it? Would they have gone to  
21 the record store and bought a CD? Would they have not done  
22 anything?

23 I mean, that's the part I don't understand how  
24 breaking all this channel information necessarily translates  
25 into something that you necessarily need in order to figure out

1 your lost profit analysis.

2 MR. BUCKLEY: So two responses to that, Your Honor.  
3 One is, I think the first point you made is more of a causation  
4 issue. Even if you could figure out what component of a  
5 particular work, what value of that is related to downloads,  
6 how do you then connect the dots and say because Brian Buckley  
7 illegally downloaded this, I lost this dollar amount. That's a  
8 causation issue.

9 In terms of specifically how do each of these things  
10 relate to a calculation of actual damages, honestly, my expert  
11 is going to tell me that. I can't do it. But our expert is  
12 saying, I can't get to an actual damages number, whether it  
13 ends up being relevant or not, unless I have more information.

14 THE COURT: Okay.

15 MR. BUCKLEY: And, Your Honor, I don't think the case  
16 law is --

17 THE COURT: What's the time period that you're  
18 looking for for that information?

19 MR. BUCKLEY: Three years prior to the lawsuit being  
20 filed. So it was November of 2014. So we would go back three  
21 years from that date.

22 THE COURT: All right. Let me hear from the  
23 plaintiffs.

24 I know that's why you chose statutory damages,  
25 because you didn't want to have to go through and do all the

1 stuff trying to calculate actual damages, but --

2 MR. CARACAPPA: And because, as Your Honor noted,  
3 based on the financials alone, no one is sure how they are  
4 going to do it. Because once you illegally download or upload  
5 or make available for download or upload a piece of music, it  
6 affects every area of distribution. Because you don't just  
7 have the people that are uploading and downloading it, but it  
8 expands, and they make it available. And you could lose not  
9 only Internet sales, but you could lose streaming and record  
10 sales.

11 So there isn't any way for anybody to take these  
12 financials and come up with an actual damages number.

13 I do have, to the extent the Court is interested,  
14 what we have produced to Cox. Does the Court want to take a  
15 look at those?

16 THE COURT: Well, just explain it to me so that I  
17 know what it is.

18 MR. CARACAPPA: Okay. So what did is we have the  
19 song, we have the year, and we have the income generated from  
20 that song. It's my understanding it's for every copyrighted  
21 issue. If it's not, then we can go back and provide that  
22 information for every copyright at issue.

23 THE COURT: For both BMG and Round Hill? I mean,  
24 he's indicated that for Round Hill it's not broken down by  
25 year.

1 MR. CARACAPPA: That's correct, for Round Hill it is  
2 not broke down by year, and we can go back and do that.

3 THE COURT: But it's only revenue, not -- it only  
4 shows the revenue per work?

5 MR. CARACAPPA: That's correct. It's not broken down  
6 by channel, for example.

7 THE COURT: Well, why is revenue -- I mean, obviously  
8 profit is going to be less than revenue.

9 MR. CARACAPPA: Yes.

10 THE COURT: Why aren't they entitled to get some  
11 sense as to what has been the profit for each copyrighted work  
12 as opposed to merely just the revenue?

13 MR. CARACAPPA: It's my understanding that the client  
14 doesn't do that by song. The client doesn't -- the client is a  
15 business, it has profits and it has losses. The revenue  
16 generated by the songs go to its bottom line. But by song, it  
17 doesn't know how much profit or loss it has. Obviously, the  
18 songs that generate more income are more profitable for them.

19 And our issue was that the way the request is drafted  
20 and what they're asking for in the motion is far broader than  
21 anything that they're going to need to actually prepare an  
22 actual damages analysis.

23 The revenue per channel, the units underlying the  
24 revenue per channel, the metrics used, again all of that  
25 information we don't think they need to perform an actual

1 damages analysis. We think that what we provided is more than  
2 enough. And they haven't been able to explain how this  
3 additional information, that level of granularity, is going to  
4 inform their expert or a jury.

5 With respect to the information they ask for on  
6 page 4, it's the financial data related to the overall  
7 business, annual revenues, costs, expenses, incremental  
8 profits, that's not even asked for in any of their document  
9 requests or interrogatories.

10 THE COURT: Let me -- 106, 107, and 108, are they in  
11 the second --

12 MR. CARACAPPA: They are Exhibit A to Cox's --

13 THE COURT: All right, I've got it.

14 MR. CARACAPPA: I'm sorry, they are Exhibit A to our  
15 opposition.

16 THE COURT: Well, 106, all documents evidencing your  
17 loss of revenues and profits as a result of the infringements.

18 That would indicate one would have to produce  
19 documents relating to revenue and profits, right?

20 MR. CARACAPPA: The problem is: As the result of the  
21 infringements. And that's the issue that we have with the  
22 request and that's the issue that we've been talking about.  
23 Which is, you can't prove a but for, but for this one download  
24 we would have lost income related to the album sales, or  
25 digital downloads, or streaming, or licensing.

1 MR. BUCKLEY: Your Honor, can I make one point?

2 THE COURT: Okay. Thank you.

3 MR. BUCKLEY: That may all be true, and that's our  
4 problem and our expert's problem. Plaintiffs don't have to  
5 calculate any of this. When our expert does his analysis, if  
6 plaintiffs think there are issues with it, or that it's flawed,  
7 or that if it's not relevant, they are obviously free to argue  
8 that.

9 And it is not their burden to prove actual damages.  
10 They are proceeding on a statutory damages theory and are  
11 entitled to do that.

12 We, however -- and I really don't think the law is  
13 ambiguous on this. There are two Eastern District cases right  
14 on point. We have a right to prove actual damages and to  
15 introduce that as part of the statutory damages analysis.  
16 There is zero question that we can't do it with what we've been  
17 provided. I mean, Mr. Caracappa doesn't even dispute that. We  
18 can't do it with revenue figures.

19 So we have to have some additional detail. And the  
20 question is just what additional detail. And we've identified  
21 pretty specifically what our expert needs. It should not be --  
22 and again, I don't want to, I don't want to be glib about the  
23 burden here, but this is a very significant case with  
24 significant damages involved, going and collecting this  
25 information and providing it in the scope of all of the

1 discovery that's occurred in this case should not be relatively  
2 that burdensome.

3 THE COURT: I mean, I read in -- I can't remember  
4 which one of the two cases that I read that you've cited, I  
5 think it was the Dae Han Video Production one that I pulled up  
6 and read, the older one, it talks -- and my recollection of  
7 that case, and it was yesterday evening, was not that you prove  
8 what actual damages are, but it has to be some overall general  
9 relationship or some ballpark figure dealing with actual  
10 damages. Not that you are going to be coming in and proving  
11 what actual damages are, or that you're entitled to do that, or  
12 that that's necessary.

13 Am I -- did I --

14 MR. BUCKLEY: Well, what the cases say, Your Honor,  
15 is that when you're considering statutory damages, you  
16 actually -- one of the two Eastern District cases actually says  
17 you start with actual damages.

18 So I don't think there is any dispute about that. So  
19 then the question is just, how do you calculate actual damages?  
20 And again, that's not plaintiffs' problem or Your Honor's  
21 problem, we have to figure that out. Cox has to figure it out.  
22 And we have hired an expert to do that.

23 But in order to compare actual damages to statutory  
24 damages, somebody has to calculate actual damages, and we're  
25 going to take on the burden of doing that, but we need the data

1 to do it.

2 THE COURT: By copyright you plan to do that?

3 MR. BUCKLEY: We will try. And they have a financial  
4 expert who will look at what our expert does and I'm sure try  
5 to poke holes in it. And they will claim that his methodology  
6 is flawed, and we will have an argument about that, but we're  
7 entitled under the law to give it a try. And the case law says  
8 that when it comes time to actually consider damages, the Court  
9 needs to take actual damages into account. So somebody has to  
10 try.

11 THE COURT: What information does the plaintiff  
12 actually have that relates to the damages calculation? On a  
13 per channel basis and then about -- you know, I assume you  
14 don't keep documents as to each revenue minus operating income  
15 and things like that for each copyrighted work?

16 MR. CARACAPPA: That's right, we don't.

17 THE COURT: How is it that the records are kept or  
18 the books kept for each of the two plaintiffs here?

19 MR. CARACAPPA: Let me rephrase the question  
20 slightly.

21 THE COURT: Okay.

22 MR. CARACAPPA: I'm not exactly sure how the records  
23 --

24 THE COURT: It was probably poorly phrased, and I  
25 understand. No, I --



1 MR. CARACAPPA: I'm not exactly sure how the records  
2 are kept, but what they can do is they can break the copyrights  
3 down by channel. So they can do physical album sales, digital  
4 downloads, streaming royalties, and licensing royalties. And  
5 they can do that, it's my understanding, per copyright by year  
6 for both BMG and Round Hill.

7 THE COURT: Okay. So that's revenue?

8 MR. CARACAPPA: That is revenue --

9 THE COURT: Revenue for each copyright?

10 MR. CARACAPPA: Yes.

11 THE COURT: Okay. Are there -- and I take it the  
12 portfolio for the overall revenue for each of these entities  
13 comes from many more copyrights than just those that are  
14 involved in this lawsuit?

15 MR. CARACAPPA: Yes, Your Honor.

16 THE COURT: But if you knew the percentage of what  
17 this revenue is and the overall revenue, and you wanted to  
18 ballpark something, you could just assign -- if it's 20 percent  
19 here, 20 percent of the operating expenses, to come up with  
20 what ballpark would be, the actual profits per -- all right.

21 Do they keep -- I take it they would have to keep  
22 operating -- do an overall business level sheet of revenues,  
23 operating expenses, and profit, is that right?

24 MR. CARACAPPA: Yes, Your Honor, they do have that  
25 information generally with respect to the company --

1 THE COURT: Company, all right.

2 MR. CARACAPPA: -- not with respect to individual  
3 copyrights.

4 THE COURT: All right. What I'm going to do -- you  
5 know, I tell you, if I have them produce all this information  
6 and you decide I'm going to just ignore it, I'm going to award  
7 costs for them to do this.

8 I mean, you're asking for it. I'm not going to have  
9 them go off and do this fishing expedition to get you a bunch  
10 of information and then you just sit back and laugh about it.

11 I mean, you've represented to the Court that you've  
12 got an expert and that your expert is going to put in the time  
13 and effort and money to coming up with an actual damages  
14 calculation. And I'm not going to have them go off and do this  
15 just because you think it might be relevant, and then you get  
16 it and you decide, I don't want to use it. Okay. If you do  
17 that, you're going to pay for it.

18 MR. BUCKLEY: I understand, Your Honor. And I commit  
19 to you that that is absolutely not what this is about. We are  
20 going to use the information. This is not a fishing  
21 expedition. And we are certainly not going to just sit back  
22 and laugh that we imposed a burden on the plaintiffs. That's  
23 not what this is about.

24 THE COURT: All right. Well, I'm going to have them  
25 produce the information on a per channel basis and overall

1 company profit/loss information, operating expenses.

2           So that hopefully once you get your portion of the  
3 revenue from these copyrighted works during the time period,  
4 you can look at the portion of the revenue from the entire  
5 company and, you know, do -- your expert can come up with some  
6 type of analysis as to, you know, what share of the operating  
7 expenses and things and hopefully come up with some sort of a  
8 ballpark as to what the profit would have been for that based  
9 on the revenues per channel and overall revenue and profit from  
10 the company.

11           All right. So that will take care of that motion to  
12 compel.

13           The motion to seal, let's deal with that one next. I  
14 don't really understand why any of the information that you're  
15 asking to be filed under seal should be under seal.

16           You know, I went back and just -- if this case ends  
17 up having a lot of material that you are going to try and file  
18 under seal other than identifying information of subscribers,  
19 at some point we're going to have to deal with that issue, but  
20 the idea that ISP numbers are changed and information kept for  
21 a certain period of time, what is commercially sensitive,  
22 confidential, or whatever about that information that it  
23 shouldn't be in the public record? Or that, you know, certain  
24 records aren't kept after a certain period of time?

25           I went through -- and let me just -- I am going back

1 to my -- the only way that the Court can really make a  
2 determination on a motion to seal is to know what's being  
3 sealed or what's being requested to be sealed and what is being  
4 filed in the public record. So the only way -- I mean, and  
5 what I'm asking is that when you file something under seal or  
6 do that, I need to get also a paper copy of the redacted  
7 version, not just a paper copy of what's filed under seal, so  
8 that I can easily go back and, you know, just flip through and  
9 compare the two.

10 I did it on online, I pulled the pleading up and saw  
11 that of the materials that you all had, there are two pages in  
12 which I understand that you've made redactions, pages 6 and 7.  
13 And then I think, if I looked at it correctly, that you were  
14 trying to seal Exhibits E, F, and G.

15 So let's just look at the plaintiffs' response to  
16 defendants' motion for instructions, page 6, the first  
17 paragraph that appears I believe is one that was redacted from  
18 the public version. And I think part of this is because the  
19 deposition transcript may have been designated confidential.

20 And I guess this is really Cox's responsibility to  
21 explain to me why that information shouldn't be in the public  
22 record, the information that's in the first full paragraph on  
23 page 6.

24 MR. CARACAPPA: Why we designated it, Your Honor was  
25 exactly correct, it's because the deposition --

1 THE COURT: Deposition --

2 MR. CARACAPPA: Transcripts were designated  
3 confidential. We felt it was Cox's confidential information  
4 that we were doing our best to protect when we filed the  
5 motion.

6 MR. BUCKLEY: And we appreciate that. We appreciate  
7 them trying to be sensitive about that. This particular  
8 paragraph does not need to be redacted.

9 THE COURT: Okay. All right. Turning to page 7.  
10 The last sentence in the carry-over paragraph I believe was  
11 redacted in the public version -- in the public version. And  
12 again, I assume that was based on -- that's part of the --

13 MR. BUCKLEY: Your Honor, the last sentence of the  
14 last full paragraph on the page?

15 THE COURT: Yes. Starts off with: Not.

16 MR. BUCKLEY: That does not need to be redacted.

17 THE COURT: All right. And then the next paragraph  
18 where it says -- I believe the redaction starts on the second  
19 line: And. Then it's redacted for five words. So the  
20 redaction goes from: And. And then the public version starts  
21 back at: For the 2.5 million Cox customers.

22 MR. BUCKLEY: Your Honor, that also does not need to  
23 be redacted. I feel compelled to add, we don't agree with  
24 these statements, but they don't --

25 THE COURT: No, I understand that. I'm not asking

1 that -- you know, part of this is to make sure that the record  
2 is as it should be in the public domain.

3 Exhibit D -- I'm sorry, Exhibit E. Yeah, Exhibit E,  
4 which is the -- a portion of the deposition transcript of Mr.  
5 Beck and a portion of the deposition transcript of Mr. Sikes.  
6 And I'm only dealing with the single page as to both, and not  
7 indicating that any of the other matters may not have  
8 confidential information that should be under seal if it ever  
9 does get filed.

10 But I am just curious as to whether there is anything  
11 in --

12 MR. BUCKLEY: Your Honor, I don't believe that the  
13 transcript excerpts in Exhibit E need to be sealed.

14 THE COURT: Then Exhibit F.

15 MR. CARACAPPA: Your Honor, I think that's our notice  
16 letter. We don't need that to be sealed.

17 THE COURT: Okay. Then Exhibit G, this appears to be  
18 e-mails back and forth between Cox and DigitalRights. I mean,  
19 is that --

20 MR. CARACAPPA: I don't think either party requests  
21 that the Court seal that.

22 THE COURT: I'm pretty sure it was filed under seal  
23 though.

24 MR. CARACAPPA: It was, and it was mainly -- it was  
25 mainly because --

1 THE COURT: It's marked confidential.

2 MR. CARACAPPA: It was marked confidential, exactly.

3 THE COURT: All right. Well, I'm going to go  
4 ahead -- and I appreciate people marking things confidential  
5 and being sensitive to that, but I think under the  
6 circumstances none of the information that was filed in this  
7 response necessarily meets the standard of filing under seal.

8 So I'm going to ask you to refile the document in the  
9 public record.

10 MR. CARACAPPA: Yes, Your Honor.

11 THE COURT: So take out the --

12 MR. CARACAPPA: And we apologize for not providing  
13 the Court with a comparison that we --

14 THE COURT: No, believe me, you're not the only one  
15 who doesn't do it. It just makes my life a lot easier when  
16 it's done. And hopefully we're not going to be having a lot of  
17 sealed information. But I'm just telling you that if we do end  
18 up doing that, it is much easier to have everything that gets  
19 filed, the public version and the sealed version, a copy of it  
20 to look at.

21 MR. CARACAPPA: Understood, thank you.

22 THE COURT: All right. So now, you know, I made a  
23 problem, and I admit it, it was part of my fault, is what we  
24 did when we were here before. And part of it, honestly, I had  
25 no sense as to how many of these IP addresses may have been

1 changed or how frequently they got changed.

2 I mean, my limited experience in this has been that  
3 those are pretty consistent for people who have service, that  
4 they keep the IP addresses. And apparently there has been a  
5 lot of transition going on, either customers coming in, going  
6 out, or the IP addresses get changed a lot.

7 The thing that concerned me the most in the, you  
8 know, back and forth on this was what efforts can we take to  
9 identify who the subscriber was during the stated time period  
10 in which the alleged infringement took place?

11 I mean, I know -- is that something that Cox is able  
12 to do or not able to do? I mean, there was, you know, some  
13 back and forth about, you know, now we're all worried because  
14 there have been 100 and some that can't be identified.

15 And what are you able to do and what have you done in  
16 that regard so far?

17 MR. BUCKLEY: So Cox spent a lot of time actually  
18 trying to make that determination and was able, was able to  
19 connect the IP addresses to a historical subscriber during the  
20 relevant historical period for 139 of the 250 IP addresses.

21 And the way they were able to do that was by going  
22 back to this CAT system, which is the system that they used to  
23 take in potential abuse complaints and forward them on to  
24 subscribers. And they were able to go back through their  
25 records and match IP addresses with subscribers.



1           They were not able to do that for 111 of the 250 just  
2 based on there not being records there that make that  
3 connection. And we really have run down every option that we  
4 can think of to try to do that, and we're not able to do it for  
5 the 111.

6           THE COURT: Well, the information that you provided  
7 for the IP addresses, the 250, that was information as to who  
8 had the IP address at what point in time?

9           MR. BUCKLEY: So there are two -- there are two  
10 categories. We were able to identify all of the current  
11 subscribers, current as of the date of your order.

12          THE COURT: Right.

13          MR. BUCKLEY: With the exception of one IP address  
14 that wasn't assigned. But for the other 249 we knew who the  
15 subscriber was at that point in time and we sent them notices.

16          Then for the same 250, we went back to the periods  
17 that are listed in Exhibit 4 and did our best to identify who  
18 those historical subscribers were.

19          THE COURT: And those were the 139?

20          MR. BUCKLEY: And that's the 139, right. So we've  
21 produced PII for 338 people. So more than the 250 sampling  
22 that we were originally looking at. 338 folks have now had  
23 their PII disclosed.

24          THE COURT: Of the 250 that you identified that had  
25 those IP addresses at the time the order was entered --

1 MR. BUCKLEY: Right.

2 THE COURT: -- or thereabouts, is there any way to  
3 establish when that IP address was assigned to that particular  
4 person or to that subscriber?

5 MR. BUCKLEY: I believe the answer to that is yes.  
6 For the current subscribers, we would be able to determine when  
7 that subscriber obtained that particular IP address.

8 THE COURT: So, I mean --

9 MR. BUCKLEY: We could provide that information. It  
10 may not be very useful, again, because of the way these things  
11 are assigned and how dynamic they really are.

12 THE COURT: Well, I mean, it may be useful and -- you  
13 know, I'm not trying to run anybody's case for them, but if  
14 Sally's name shows up as one of the 250, and she got that IP  
15 address from Cox's records a month ago, and the infringement  
16 that is showing up as being a problem was five months ago, they  
17 may not necessarily decide to spend the time and effort to go  
18 talk to Sally.

19 I mean, they want to try and get, I assume, to the  
20 extent that they feel like it's necessary to go one more level  
21 down, to talk to the subscriber who actually had that IP  
22 address at the time of the alleged downloads, right?

23 So just -- and I'm not -- I know you're not the  
24 technical person behind all this, how dynamic are these IP  
25 addresses? I mean, what is the general rule or how is it

1 generally followed? Does it vary from region to region? Is it  
2 something that Cox normally does that, you know, they assign  
3 new IP addresses every three weeks, six weeks, a month,  
4 whatever?

5 Is there a standard that gets applied here?

6 MR. BUCKLEY: I can speak to it generally. And there  
7 are some standards, and it does vary a bit by region at a top  
8 level as to how IP addresses get assigned, but the dynamic  
9 piece of it and the fact that they turn over frequently, it  
10 relates to this.

11 So the lease for an IP address lasts for 24 hours.  
12 It is continually updated. Which means the person maintains  
13 their IP address unless something intervenes to cut off that  
14 lease. But there are a number of different things that can  
15 cause that, including if somebody shuts their router off and  
16 turns it back on, something is wrong -- and, you know, you've  
17 probably done this. Something is wrong with the router, so you  
18 turn it off. When you turn it back on, you're going to get a  
19 new IP address. If there is a power outage, you're going to  
20 get a new IP address.

21 So it is absolutely true that some people keep their  
22 routers on and their computers on and they maintain their IP  
23 address for months at a time. It is more common, however, that  
24 those IP addresses do turn over and they don't typically last  
25 months at a time.

1           So here, for example, of the 139 historical folks we  
2 were able to identify and the 250 current folks, there are only  
3 29 people who had their IP address at the historical period and  
4 still have it today.

5           So if that helps you. In that six-month period,  
6 there was 80 percent turnover. I'm probably wrong on that  
7 percentage, I'm trying to do it off the top, but something in  
8 that range.

9           THE COURT: Okay. All right. Well, the issue, you  
10 know, and it isn't part of what this motion is, but what  
11 records are kept and how they were kept for the IP addresses is  
12 something that at some point probably is going to end up having  
13 to get addressed. Because, you know -- but as of now, you've  
14 been able to identify 139 of the 250 by the time period in  
15 which the alleged downloads took place, is that right?

16           MR. BUCKLEY: That's right, attached to the time  
17 periods identified in Plaintiff's Exhibit 4.

18           THE COURT: 4?

19           MR. BUCKLEY: Right.

20           THE COURT: All right. There were a number of people  
21 who communicated with Cox who haven't filed something with the  
22 court.

23           MR. BUCKLEY: Correct.

24           THE COURT: I think -- and I'll hear from you, but my  
25 sense is merely communicating to you and not doing something

1 with the court isn't sufficient for you to withhold any  
2 information.

3 Having filed something with the court, whether it's  
4 in a timely manner or not, I think I have to deal with that  
5 issue. And that my sense is that of those -- and there have  
6 been several batches of ones that have come in. And the person  
7 who provided no identifying information, you know, I can't say  
8 that you can't produce any information because this one could  
9 be one of many.

10 MR. BUCKLEY: Understood.

11 THE COURT: So I think he or she has waived their  
12 right to be able to have any information protected because they  
13 didn't provide me with enough information to deal with the  
14 situation.

15 So, overall, I think the idea -- and I can't remember  
16 the exact breakdown, but there were a number of people who have  
17 communicated to you who did not submit something to the Court.

18 MR. BUCKLEY: That's right, Your Honor. It's roughly  
19 35.

20 THE COURT: Okay. I think you need to go ahead and  
21 provide that information, and I'll order that you do that.  
22 I'll put in an order saying that of those that did that, the  
23 Court is hereby ordering you to provide that information.  
24 Okay?

25 The ones that have submitted something to me, let's

1 talk about a process for me to make a determination on those.  
2 And I want to hear from each side.

3 I mean, some of these people -- you know, I don't  
4 know whether they -- an unusual group of people who have  
5 submitted correspondence. And it's always entertaining to see  
6 the arguments some people make or the things that some people  
7 say.

8 I mean, what I ended up doing, as you can probably  
9 tell by the filing, was going through and doing my best to  
10 redact anything that was of a personal identifying information  
11 as to each of those, but still keeping the IP addresses to the  
12 extent that we were able to correlate those without the names  
13 and addresses and other information.

14 I mean, I suspect I will need to do some type of an  
15 order that addresses those. And I just want to hear what Cox's  
16 position is on that and what the plaintiffs' position is on  
17 whether that information should be disclosed or not or any  
18 further information as to those.

19 Do you have that number?

20 MR. BUCKLEY: There were 49 individuals who contacted  
21 Cox.

22 THE COURT: Cox.

23 MR. BUCKLEY: And for whom we withheld PII on that  
24 basis. I believe that there are 14 individuals who have filed  
25 something with the court.

1 THE COURT: Okay. All right. Of which --

2 MR. BUCKLEY: So for the remaining --

3 THE COURT: -- 13 we can have some sort of  
4 identifying information. I think we've got the IP addresses  
5 for probably 13 of those 14.

6 MR. BUCKLEY: I believe that's correct.

7 THE COURT: Okay.

8 MR. BUCKLEY: And I understood Your Honor to say that  
9 you are going to enter an order for the remaining 35, that we  
10 need to produce that PII?

11 THE COURT: Right.

12 MR. BUCKLEY: Which we'll do. So then the question,  
13 I believe, is what do we do with respect to the 13 individuals  
14 who have filed something and identified their IP address. And  
15 I am happy to speak to that from Cox's position if you would  
16 like.

17 THE COURT: Okay, thank you. I will hear from you  
18 first.

19 MR. BUCKLEY: So I'm not going to reargue the motion  
20 to compel, obviously. It's Cox's position that we shouldn't  
21 have been required to provide any subscriber PII. I understand  
22 that that ship has sailed.

23 But, Your Honor, the original order was, and the  
24 representation from the plaintiffs was, we don't need this  
25 information to prove direct infringement. And I think at least

1 in part based on that Your Honor said, okay, so this is  
2 intended to be a sampling so we can see how our IP addresses,  
3 how do they turn over, who are these folks.

4 So they have now got a sampling, 338 individuals,  
5 which is more than the 250 you originally identified. And you  
6 have got 14 people who took the time to send something to the  
7 court and expressed what are to them at least legitimate  
8 concerns about their individual or personal information being  
9 disclosed.

10 I would submit that the proper approach here is to  
11 not produce those folks' PII. They have the sampling they  
12 need, a broader sampling than Your Honor originally thought was  
13 appropriate. I would say for those 14, we should be ordered to  
14 keep their PII protected.

15 THE COURT: Okay.

16 MR. CARACAPPA: So maybe I can go a little out of  
17 order when compared to what I was going to do and address the  
18 14 people first.

19 THE COURT: Okay.

20 MR. CARACAPPA: Because I think we may be able to  
21 resolve this issue. It appears that of the 14, four do not  
22 have IP addresses. Which leaves 10. And of those 10, two of  
23 them, Doe number 9 and number 17 from Exhibit 14 -- I can  
24 provide the Court with more information if that is helpful on  
25 that subscriber. But two of those 10 are both current and



1 historical. So they would be relevant to the Court's order.

2 The other eight are not what was called for by the  
3 Court's order and are current subscribers who may or may not  
4 have that IP address and who -- well, who apparently do have  
5 that IP address, but may or may not be downloading the  
6 copyrights at issue.

7 THE COURT: Who may not have had the IP address at  
8 the date identified in the exhibit?

9 MR. CARACAPPA: Exactly.

10 THE COURT: Okay.

11 MR. CARACAPPA: So what I would like to do is take a  
12 step back.

13 THE COURT: Okay --

14 MR. CARACAPPA: We don't think this problem was  
15 created by the Court. We think it was created by Cox. We  
16 think the order was crystal clear. And the order stated that  
17 Cox had to produce the personal information for the 250  
18 subscribers identified in the exhibit. And if the subscriber  
19 filed something with the court by June 5, Cox could withhold  
20 that information. If they didn't, Cox had to produce it.

21 Well, in the letter that Cox sent its subscribers,  
22 and that's Exhibit A to Cox's motion, it's a standard 512(h)  
23 letter. It's not a letter that was catered to the Court's  
24 order. And there are three reasons why we think that. First,  
25 it says in the first paragraph: Please be advised that on

1 May 15 a civil subpoena to produce documents was received. And  
2 that's not true.

3 And then if you go to the third paragraph, it says:  
4 In order to identify the defendants. We explained to Cox and  
5 to this Court that we don't need this information to identify  
6 the defendants. We need it to identify the direct infringers  
7 on Cox's networks, but they're not defendants and they're not  
8 going to be defendants.

9 And then Cox goes on to say: Unless we receive  
10 notification from you of your intent to file objections. So  
11 Cox is telling the subscriber, all you have to do is tell us  
12 you intend to file the objection and we won't produce the  
13 information.

14 So we think this is the letter that created all the  
15 confusion and why the Court has received so many John Does, and  
16 that there is a discrepancy between the number of documents the  
17 Court has received and the number of calls that Cox has  
18 received.

19 THE COURT: So what about Exhibit B, which is  
20 different than Exhibit A?

21 MR. CARACAPPA: Hang on one second, Your Honor.

22 THE COURT: Sure. I mean, Exhibit A --

23 MR. CARACAPPA: Yes, Your Honor. It looks like one  
24 was sent to the current holders of the IP addresses, and one  
25 was sent to the historical holders of the IP addresses. And

1 both letters suffer from the same problems.

2 And what they've done by sending this letter is  
3 they've tainted the well. Now none of these people want to  
4 talk to us because they think that we're going to bring them  
5 into the lawsuit.

6 So we didn't just want this information for  
7 statistical purposes, to prove the changing of the IP  
8 addresses. But we wanted the opportunity to talk to these  
9 people and ask them, for example, why do you use Cox Internet?  
10 Are you drawn to the Cox Internet service because you can  
11 illegally download music?

12 Now none of these people want to talk to us because  
13 it says that they're going to be defendants in the lawsuit. So  
14 that's a problem we think Cox created.

15 Fast forward to the day that they were supposed to  
16 provide the 250 -- the information related to the 250 IP  
17 addresses. They didn't. They provided information with  
18 respect to 122, less than half.

19 This other 250, while we appreciate it, we didn't ask  
20 for it, it's not part of the Court's order. We submit the only  
21 reason they did it was to artificially inflate the numbers so  
22 they could come to the Court and argue, well, we produced  
23 actually more than what the Court wanted. But we didn't give  
24 them evidence that said the current subscribers of those  
25 addresses is infringed.

1           So while the Court is correct, it has some relevance,  
2 they're going to be used for different purposes.

3           So we now have less than half of this information.  
4 We asked them on June 8 to explain why the information was  
5 unavailable and to explain why they were withholding subscriber  
6 information only if the subscriber contacted Cox. They didn't  
7 respond.

8           We contacted them again on June 10, they didn't  
9 respond. It was not until the 11th on a meet and confer where  
10 we explained, you know, we have to have answers to this  
11 information, otherwise we're going to file something with the  
12 Court. During that conversation they said, we're going to move  
13 for clarity.

14           So we figured, well, we could file two ships passing  
15 in the night, or we can wait and oppose, and that's what we did  
16 in our motion.

17           What we didn't know until yesterday was that they're  
18 destroying this information. Now, we think that could create a  
19 big problem. Cox brings up the fact that we said this  
20 information isn't necessary to prove direct infringement. And  
21 that's correct. We think what's relevant is the fact that  
22 there is infringement occurring on the Cox network regardless  
23 of who it is.

24           But what we argued during the hearing and what they  
25 have shown that they are going to do in their expert report is

1 their expert is going to say, well, all of these people, these  
2 150,000 people, they may be subscribers, but they may not be  
3 doing the downloading. They may have, for example, what's  
4 called open WiFi. And it may be the 97-year-old grandmother  
5 has open WiFi and all the teenagers in the neighborhood are  
6 congregating on her porch and illegally downloading  
7 information.

8 And they're pointing to the empty chair and they're  
9 saying, oh, they haven't proven that that's not open WiFi. And  
10 at the same time they're destroying the information related to  
11 the 95-year-old grandma.

12 So we think they should have been preserving this  
13 information since they were on notice of this issue, which was  
14 back in 2012. At a minimum, they were on notice that they  
15 should have been preserving this information the day the  
16 complaint was filed. And it's not clear from their reply  
17 whether or not they have preserved that information or whether  
18 or not they are continuing to destroy it.

19 My last point is we think that this is a pattern.  
20 They've done this with the Rightscorp notices. We send them to  
21 them, they delete them. And they say, well, now we don't have  
22 notice. And now they're doing the same thing with respect to  
23 the addresses on the Cox network.

24 So while we ask for certain relief in the brief, we  
25 just found out for sure, I guess, as set forth in their motion

1 that they are in fact destroying or have destroyed this  
2 information, and we do think additional briefing is warranted  
3 in this case.

4 THE COURT: Well, I'm going to deal with the issue of  
5 the pending things. And if you want to, you know, further  
6 brief that issue, I think it does need further briefing before  
7 I certainly make a decision on it and know what the situation  
8 is.

9 MR. CARACAPPA: Okay, Your Honor. Thank you.

10 THE COURT: What have you done with the 139  
11 subscribers that you now know who they were at the time period  
12 in which the alleged downloads occurred?

13 MR. CARACAPPA: So I will answer that question if the  
14 Court requires, but right now we submit it's work product. We  
15 are in the process of contacting them.

16 I will say that --

17 THE COURT: All right. The issue, as you know -- I  
18 don't want to have everybody in here arguing motions and I  
19 spend a lot of time doing it to get 10, 15 more names if it's  
20 not something that you think is really important to your case.

21 And, you know, you got 139. You will get a few more  
22 maybe as a result of my ruling today. And I don't know whether  
23 -- how that relates to historical versus, you know, the time  
24 that the information was provided. But, you know, what -- so  
25 you are making use of the ones that you currently have, I take

1 it?

2 MR. CARACAPPA: Yes.

3 THE COURT: And you do want more if available?

4 MR. CARACAPPA: Yes to the first part of the  
5 question. Maybe what we can do, if it please the Court, is  
6 I'll go back and I'll consult with my colleagues. And if we  
7 need more, we can request that additional difference between  
8 the 137 and the 250 that the Court ordered.

9 But, yes, we are using the information that has  
10 already been produced to us.

11 THE COURT: Okay. All right. Okay. Well, this will  
12 probably get done in phases just because I think I'll probably  
13 enter an order today, hopefully, that deals with the other two  
14 motions sort of in the fashion that we normally do.

15 Just for the sake of -- I then will probably try and  
16 do a separate motion that deals only with the issue of who  
17 contacted Cox and who hasn't filed something with the court,  
18 and ordering that those who have not filed something with the  
19 court and only contacted Cox, Cox is hereby ordered to do so.  
20 Just to make it a clean order for you to have in case something  
21 comes up and you need it.

22 I probably won't until sometime after today enter the  
23 order that deals with the other people who have filed things  
24 with the court and addressing what to do with those. I want to  
25 go back and look at them one more time.

1 MR. BUCKLEY: Could I make one factual point on that  
2 issue?

3 THE COURT: Okay.

4 MR. BUCKLEY: So even the folks whose letters don't  
5 include an IP address, it's possible that we can identify those  
6 people based on other things that are in the letter as folks  
7 who talked to Cox.

8 So when Your Honor goes back and tries to decide how  
9 to deal with all those folks, just the fact that there is not  
10 an IP address in there doesn't necessarily mean we can't tell  
11 you --

12 THE COURT: Right. No -- --

13 MR. BUCKLEY: -- who the person is.

14 THE COURT: Other than 1 --

15 MR. BUCKLEY: Who we don't -- and that one we don't  
16 know.

17 THE COURT: Right. And I have no way of knowing that  
18 one. Everyone else, there is information of a name, address,  
19 or something that could probably provide -- that I could  
20 probably allow that to be filed under seal so that only counsel  
21 has access to it and that only you would have access to that if  
22 I decide to allow it to be opened up.

23 So I think the ones that we don't necessarily have an  
24 IP address, we have some identifying information as to name,  
25 and you can probably run a subscriber history record or



1 something for those and pull up what may have been their IP  
2 address at some point in time.

3 MR. CARACAPPA: Your Honor, one point of  
4 clarification. We have filed a response to docket number 81.

5 THE COURT: Right.

6 MR. CARACAPPA: The responses to docket number 88,  
7 85, and 90 are to due on Monday.

8 THE COURT: Let me just see what -- let me just get  
9 my docket sheet out.

10 MR. CARACAPPA: I think that's the rest of the John  
11 Does.

12 THE COURT: 81 was the one that we don't have any  
13 identifying information on. 88 is the large package of letters  
14 that I consolidated into a single exhibit. And then there was  
15 -- what was the other docket number?

16 MR. CARACAPPA: 85.

17 THE COURT: 85.

18 MR. CARACAPPA: And 90.

19 THE COURT: Okay.

20 MR. CARACAPPA: And I think we do have the IP address  
21 for docket number 81. The issue that exists with respect to  
22 the John Doe at docket 81 is that it's current. It's not a  
23 historical subscriber.

24 MR. BUCKLEY: And, Your Honor, there was confusion on  
25 that point. We do not believe we know who John Doe in docket

1 81 is. Plaintiffs do seem to think they were able to connect  
2 it to an IP address, and maybe we'll just need to talk about  
3 how you guys got there because we can't figure it out.

4 MALE VOICE: It was listed in the order, for docket  
5 81 -- 82, supposed to be an IP address for that docket 81.

6 MR. BUCKLEY: How is that possible?

7 MALE VOICE: It was issued by the Court.

8 MR. BUCKLEY: Yeah, we can talk about it.

9 THE COURT: All right.

10 MR. BUCKLEY: We, Cox, don't believe we can identify  
11 the John Doe in docket 81.

12 THE COURT: Okay. Well, at least we'll be able to  
13 take care of the ones that haven't filed something with the  
14 Court immediately, and then I'll look at it and may -- if I  
15 have issues and need some further information, I'll set up a  
16 call for us to coordinate that. Okay?

17 MR. CARACAPPA: Thank you, Your Honor.

18 THE COURT: Thank you, counsel.

19 MR. BUCKLEY: Thank you, Your Honor.

20 NOTE: The hearing concluded at 12:14 p.m.

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C E R T I F I C A T E   o f   T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell

Norman B. Linnell

Court Reporter - USDC/EDVA